89-1329

CASE NO.

IN THE

Supreme Court Of The United States

ROBERT ALLEN WILLIAMS,
Petitioner,

vs.

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

FRANK O. BURGE, JR.
Counsel for Respondent

OF COUNSEL:

BURGE & WETTERMARK, P.C.
2300 SouthTrust Tower
Birmingham, Alabama 35203
Telephone: 205-251-9729

32 pp

QUESTION PRESENTED FOR REVIEW

Whether a state court, in an action under the Federal Employers' Liability Act, can ignore *Shenker v. Baltimore & Ohio Railroad Company*, 374 U.S. 1, (1963), and other F.E.L.A. decisions of this Court, and shift the responsibility for the safety of the workplace from the railroad to the injured employee.

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Plaintiff-Petitioner, Robert Allen Williams, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, certifies that the following listed parties have an interest in the outcome of this case:

1. Illinois Central Railroad Company.

2. IC Industries, Incorporated.

3. Robert Allen Williams.

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CASE NO. 90-

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ROBERT ALLEN WILLIAMS,
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Allen Williams, respectfully requests that this Court grant his petition for writ of certiorari seeking review of the judgment of the Supreme Court of Alabama dated November 17, 1989.

OPINIONS BELOW

The Opinions of the Alabama Court of Civil Appeals and the Supreme Court of Alabama have not been released for publication in the official reporter; however, the Opinions are reproduced at pages A-1 through A-14 of the Appendix hereto. No Opinion was issued by the trial court, The Circuit Court of Jefferson County, Alabama.

JURISDICTION

The majority judgment of the Supreme Court of Alabama, without Opinion, was rendered on November 17, 1989. A dissenting Opinion was rendered the same date. The majority and dissenting Opinions of the Alabama Court of Civil Appeals were rendered on March 29, 1989, and on May 3, 1989, plaintiff's application for rehearing was denied without Opinion by that court.

This action was brought pursuant to the provisions of 45 U.S.C. Section 51 et seq. as a Federal Employers' Liability Act case. This Court has jurisdiction to review this case on petition for writ of certiorari pursuant to the provisions of 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

SECTION 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by

reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter

SECTION 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SECTION 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not

> be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of emloyees contributed to the injury or death of such employee.

STATEMENT OF THE CASE

This case was commenced on June 13, 1986, against the Illinois Central Gulf Railroad Company ("ICG") by petitioner, Robert Allen Williams.

Mr. Williams was an employee of ICG and was injured while throwing a switch which had been vandalized with a large amount of grease (there was a public grade crossing nearby where trains delayed vehicular traffic). He sustained injuries requiring two surgeries, six months lost railroad wages, and some permanent impairment of earning capacity. In argument ICG's counsel urged $35,000.00 to $36,000.00 as being reasonable damages.

Mr. Williams sued ICG under the provisions of the Federal Employers' Liability Act, 45 U.S.C. Section 51, et seq. The jury returned a verdict against ICG for $1.00. The trial court overruled Mr. Williams' motion for new trial based on inadequacy of the verdict. Two members of the Alabama Court of Civil Appeals affirmed, one member dissenting, and on certiorari six members of the Alabama Supreme Court affirmed without opinion, three members dissenting with an opinion.

On December 4, 1985, it became Mr. Williams' duty to throw a railroad switch which is a heavy implement designed to move railroad rails from one position to another in order to facilitate a change of direction by railroad rolling stock. The particular switch involved was a switch known by Mr. Williams and the other members of his crew, as well as others, to be extremely hard to throw. Because of this difficulty Mr. Williams postured himself in a protective and braced position with his foot against the outside

of the switch tie at a place that was worn and darkened by his and other switchmen taking the same protective measure. There was a lot of non-railroad type grease on the switch handle. It was nighttime, it was cold, he had on gloves, and he had never encountered grease on the handle of a railroad switch before. He looked at it as he lifted it and did not see any grease nor did he make any particular examination of the handle for grease. He picked it up and started pulling the switch toward him in his braced position. Because of the grease on the switch handle and the physical difficulty offered by the switch, his hands slipped off the switch handle when he got to the hardest part of his pull, he fell backwards, hit on his back, and was injured. He subsequently had surgery for an aggravation of a previously existing pilonidal cyst and surgery for a ruptured lumbar intervertebral disc caused by his fall. He was unable to work for six months.

45 U.S.C. Section 53, makes the F.E.L.A. a comparative negligence statute, purely comparative.

The railroad took the position that Mr. Williams was guilty of contributory negligence because he did not inspect the switch handle for grease prior to using it. The railroad had a precautionary rule that employees inspect appliances before using them.

On the issue of contributory negligence, the plaintiff took a position consistent with that of Mr. Williams' boss, his conductor, who testified that he would never expect Mr. Williams to inspect the handles of the switches before throwing them at night. In addition there was no contributory negligence because there was no foreseeability of injury by Mr. Williams. By its verdict the jury sustained the plaintiff's position on the railroad's negligence in failing to provide a reasonably safe switch for Mr. Williams' use.

On appeal, the Alabama Court of Civil Appeals referred to a railroad rule requiring employees to inspect tools and appliances before using them. That court should have applied *Shenker* and rejected this evidence. It should have stated the rule of law of *Shenker*, that the railroad had the duty of inspecting the switch before sending Mr. Williams to throw it. Instead, the Court of Civil Appeals enhanced the railroad's rule, relieved the railroad of its duties under *Shenker*, and placed those duties on Mr.

Williams. Having placed these duties upon Mr. Williams, the court then held him guilty of contributory negligence for violating the rule. The railroad's rule as it was enhanced and applied to Mr. Williams by the Alabama Court of Appeals was as follows:

> [I]t is the responsibility of the men working to inspect the equipment and tools that they work with to *be sure* that they are *safe to use.*
> (Emphasis supplied)

Op. of Court of Civil Appeals, A-2.

Applying this contributory negligence to Mr. Williams, the majority opinion of the Alabama Court of Civil Appeals held $1.00 to be adequate damages in the case after disregarding *Shenker* and the railroad's duty to Mr. Williams and making Mr. Williams an insurer of the safety of the switch.

On March 29, 1989, the Court of Civil Appeals of Alabama issued its majority written decision and its dissenting opinion in the case. (A-2)

On April 12, 1989, the plaintiff filed his application for rehearing and argument.

On May 3, 1989, the Court of Civil Appeals denied plaintiff's application without written opinion.

On May 17, 1989, the plaintiff filed a petition for writ of certiorari to the Alabama Court of Civil Appeals in the Alabama Supreme Court. The Alabama Supreme Court granted the writ and subsequently on November 17, 1989, ruled that the writ had been improvidently granted thereby affirming the Alabama Court of Civil Appeals. There was no written opinion by the majority of the Alabama Supreme Court but three members of the court dissented and issued a written opinion which is attached. (A-5)

Accordingly, Mr. Williams now files this petition for writ of certiorari.

REASON FOR GRANTING THE WRIT

The United States Supreme Court has repeatedly held that the railroad company owes to its employees

> the non-delegable duty of using reasonable care to supply them with a safe place to work and safe and suitable tools and appliances with which to work. This duty includes inspections by the carrier *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 11 (1963). It has never held that the employee is surety for the safety of his own workplace. Even the railroad has never been held to be an insurer of the safety of the employees' workplace. Yet, the opinion in the case at bar upholds a $1.00 verdict as being adequate on the basis of contributory negligence of Mr. Williams bottomed on the reasoning that a railroad rule made Mr. Williams the responsible party to inspect the railroad's tools and appliances to *be sure* that they were *safe to use.*

The Alabama courts' placing the duty to be sure that the appliance is safe to use upon Mr. Williams shifts the duty of supplying reasonably safe and suitable appliances from the railroad company to Mr. Williams. In *Shenker v. Baltimore & Ohio Railroad Company*, 374 U.S. 1, 11 (1963), this court quoted with approval *Texas & Pacific Railroad Co. v. Archibald*, 170 U.S. 665, as follows:

> ...the duty of the company to use reasonable diligence to furnish safe appliances is ever present, and applies to its entire business, it is beyond reason to attempt by a purely arbitrary distinction to take a particular part of the business of the company out of the operation of the general rule, and thereby to exempt it, as to the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition.

Id. at 670.
Shenker held that a B&O employee could recover even though he was injured by a faulty door on a P&LE car that had "just pulled into the station." *Shenker* held:

> We hold that the B&O had a *duty to inspect* P&LE cars before permitting its employees to work with them. (Emphasis supplied)

The Alabama Appellate Courts in the case at bar refused to follow *Shenker*, but instead referred to trial court evidence of a railroad rule, enhanced it and stated:

> [I]t is the responsibility of the men working to inspect the equipment and tools that they work with to *be sure that they are safe to use.*

The railroad argued in *Shenker* that it had not had an opportunity to inspect the foreign car which had just pulled into the station and that argument was summarily rebuffed by this court with the words:

> We hold that the B&O had a *duty to inspect* P&LE cars before permitting its employees to work with them. (Emphasis supplied)

The car of *Shenker* and the switch in the case at bar are analagous. Both are protected by 45 U.S.C. Section 51 ("any defect or insufficiency, due to its negligence, in its cars ... appliances ..."). The Alabama Courts' stating that it was Mr. Williams' duty to "be sure that [the appliances] are safe to use " (A-2) goes even further than shifting the duty from the employer to the employee, it makes the employee a surety or guarantor of the safety of the appliances supplied for his work by the railroad company.

That the duty to inspect is on the railroad and not the employee was highlighted in a Federal Employers' Liability Act case of the Supreme Court of Alabama, *Seaboard Railroad v. Gillis*, 294 Ala. 726, 321 So. 2d 202 (1975). The analogy between the vehicle in *Gillis* and the switch in the case at bar is clear. Both are grounded on 45 U.S.C. Section 51. It was stated in *Gillis*:

> The railroad's position as sole owner and ultimate controller of the vehicles assigned to Gillis placed upon it a duty to maintain those vehicles in safe working order for the protection of Gillis.

* * *

> As to the question whether the railroad exercised reasonable diligence to discharge its duty and avoid foreseeable injuries, evidence of the railroad's procedure for inspection, repair and maintenance of its vehicles is relevant. It is uncontested that the railroad did not conduct a trouble-shooting system of inspection on its vehicles. The motor car involved in the accident had been used by Gillis for three years and during that time no efforts were made to avert mechanical difficulties until specific problems arose. Instead of holding regular inspections, the railroad instituted *a company policy that placed a duty on Gillis* and other motor car operators to report mechanic trouble when it arose by calling the maintenance supervisor. (Emphasis supplied)
>
> * * *
>
> If the railroad had actually conducted a regular inspection procedure, these arguments would go far toward discharging its duty of care. But, in retrospect, to say that if we had inspected, perhaps we would have found nothing, avails the railroad little. *As to the railroad's duty to inspect*, see *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963).
> (Emphasis supplied)

Id. at 730, 731.

The employee in *Gillis* was given a credit card by the railroad company and had a "maintenance supervisor for the motor car" assigned to him. Nevertheless, *Shenker* applied. Nowhere in *Gillis* is there any inference from the Supreme Court of Alabama that the employee was the one obligated to make the inspections called for by *Shenker*. Certainly if there were exceptions to *Shenker* then *Gillis* would be an exception due to the fact that the truck and motor car were entrusted to Gillis on a full-time basis. But no exception was made in *Gillis*. No exception should be made in the case at bar either. The blanket rule of *Shenker* is that railroads

shall inspect equipment before assigning employees to work with such equipment. That duty cannot be reversed. The onus cannot be shifted from the railroad company to the employee as was done by the appellate courts of Alabama in the case at bar — all to the end of creating contributory negligence on the part of Mr. Williams because he did not make "sure" that the switch was "safe to use."

Since *Gillis*, quoting *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), points out that foreseeability is an ingredient in negligence in F.E.L.A. cases, it is pointed out to this court that Mr. Williams had never in his many years of work as a railroad switchman found a switch handle covered with non-railroad type grease prior to discovering this grease after he had fallen.

CONCLUSION

The jury found the ICG to be guilty of negligence, hence the verdict. The amount of damages of $1.00 was so obviously inadequate that it should be set aside as a matter of law. The vehicle used by the appellate courts of Alabama to uphold the $1.00 verdict in a Federal Employers' Liability Act case was to shift the burden of seeing that appliances are reasonably safe for the use of railroad employees from the railroad company to the employee. That is not proper and the United States Supreme Court should intervene and declare the impropriety of the Alabama appellate courts' deviation from both *Shenker* and rather basic Horn Book type F.E.L.A. law.

Respectfully submitted,

By: Frank O. Burge, Jr.
FRANK O. BURGE, JR.
Counsel for Plaintiff-
Petitioner, Robert Allen
Williams

OF COUNSEL:
BURGE & WETTERMARK, P.C.
2300 SouthTrust Tower
Birmingham, Alabama 35203
Telephone: 205-251-9729

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been served upon all parties required to be served: Michael C. Quillen, Esq. and Samuel M. Hill, Esq., Cabaniss, Johnston, Gardner, Dumas & O'Neal, Post Office Box 830612, Birmingham, Alabama 35283-0612, by forwarding three (3) copies thereof through the United States mail, first-class postage prepaid and properly addressed, on this 14th day of February, 1990.

Frank O. Burge, Jr.

FRANK O. BURGE, JR.
Counsel for Plaintiff

APPENDIX

APPENDIX

STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1988-89

Civ. 6701

Robert Allen Williams

v.

Illinois Central Gulf Railroad Company,
a corporation

Appeal from Jefferson Circuit Court

HOLMES, Presiding Judge

This is a Federal Employers' Liability Act (FELA) case. 45 U.S.C. §§ 51-60 (1982).

Williams sued his employer, Illinois Central Gulf Railroad Company (ICG), asserting negligence on the part of ICG which resulted in injuries to Williams. ICG denied liability and alternatively asserted Williams's contributory negligence as a defense to its liability. The jury returned a general verdict in favor of Williams in the amount of one dollar ($1). Williams filed a motion for a new trial based on inadequacy of damages, which was denied. Williams, through able and distinguished counsel, appeals, and we affirm.

The dispositive issue on appeal is whether the trial court abused its discretion in denying Williams's motion for a new trial.

The pertinent facts as revealed by the record are as follows: Williams was employed as a head brakeman with ICG at the time

of his injury. At approximately 10 P.M. on December 4, 1985, Williams was attempting to "throw" a track switch (a heavy steel device used to allow trains to move from one track to another). After Williams had unlocked the track switch, he grabbed the handle of the switch and attempted to turn or "throw" the switch. When he pulled on the handle, Williams's hands slipped off and he fell backwards. After he fell, Williams noticed grease covering his gloves and the switch handle.

Williams completed his work for the night and prepared an accident report. On the report the cause of the accident was listed as "handle on switch was heavily greased." Further, the report stated that the equipment was defective "because of excessive grease on handle of switch." The record also indicates that the handle was hard to turn.

The record further reveals testimony that the grease on the handle was not the type the railroad used to lubricate switches and that the switch appeared to have been vandalized. Additionally, there was testimony that it is the responsibility of the men working to inspect the equipment and tools that they work with to be sure that they are safe to use.

We are governed in this case by the decisions of the federal courts. *See* cases cited in *Kite v. Louisville & Nashville Railroad Co.*, 508 So. 2d 1172 (Ala. Civ. App. 1986).

Additionally, we are to presume that the jury verdict here is correct, and we will not set it aside unless the verdict is the result of passion, prejudice, or improper motive. *Brown v. Seaboard Coast Line Railroad Co.*, 473 So. 2d 1022 (Ala. 1985).

The only issue we must address in this instance pertains to the amount of the award. However, the question is not whether we think the award was low, but whether the trial court abused its discretion in denying Williams's motion for a new trial. *Porterfield v. Burlington Northern, Inc.*, 534 F. 2d 142 (9th Cir. 1976). Williams has a substantial burden to demonstrate that the trial court's discretion was abused. *Porterfield*, 534 F. 2d 142.

After a careful review of the record, we conclude that Williams has not met this burden.

First, we note that damages frequently depend upon whether the jury believes the plaintiff (here Williams). Juries are not required to believe every expression of opinion by an expert or

any other witness. *Hall v. Texas & New Orleans Railroad Co.*, 307 F. 2d 875 (5th Cir. 1962). The jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. *Dennis v. Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208 (1963). Further, we point out that the ultimate damages depend on the degree of negligence Williams may have contributed to the whole accident as compared with that of ICG.

Title 45 U.S.C. § 53, in part, provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Here, both the negligence of ICG and the contributory negligence of Williams were hotly contested at trial. ICG's contributory negligence defense was based on Williams's failure to discover grease on the handle of the switch before he attempted to throw it. ICG introduced evidence that Williams had a duty imposed by railroad rules to examine the switch before he attempted to throw it. Further, Williams made no contention that he had an inadequate opportunity to inspect the switch handle.

Because the verdict here is a general one, we do not know what percentage of the negligence causing the accident the jury allotted to Williams. Certainly, it would appear that the jury found Williams's negligence substantial, and such is supported by the evidence. It is well within the province of the jury to conclude that Williams fell simply because his hands slipped and that Williams was guilty of contributory negligence in his failure to examine the switch handle. In other words, the jury could have concluded from the evidence that, although ICG was negligent, Williams failed to inspect the equipment before he used it and was, therefore, also negligent. We also note that the evidence before the jury could have supported a finding of no negligence on ICG's part. Therefore, the jury's conclusion of substantial negligence on Williams's part is certainly not error.

In view of the above, we cannot say that the trial court abused its discretion in denying Williams's motion for a new trial. This is especially true in light of the presumption of correctness accorded a jury verdict.

This case is due to be affirmed.
AFFIRMED.
Ingram, J., concurs.
Robertson, J., dissents.

ROBERTSON, Judge (dissenting)

I respectfully dissent.

Had the jury's award been excessive, the trial court could have granted a new trial or ordered a remittitur. Undisputed damages in this case were shown to be in excess of $30,000. However, defendant's counsel argued that the verdict should be less because of comparative contributory negligence on the part of the defendant.

The verdict for $1.00 was so inadequate as to affirmatively indicate that it resulted from mistake or some other improper motive.

A substantial additur should have been made by the court, or the plaintiff should have been granted a new trial based upon the inadequacy of damage due to a mistaken interpretation of joint tort-feasor liability or comparative contributory negligence.

Therefore, I respectfully dissent.

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1989-90

Ex parte Robert Allen Williams

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

88-1071

(Re: Robert Allen Williams
v.
Illinois Central Gulf Railroad Company, a corp.)

(Jefferson Circuit Court, CV-86-3470)

PER CURIAM.

WRIT QUASHED AS IMPROVIDENTLY GRANTED.

Maddox, Almon, Shores, Houston, Steagall, and Kennedy, JJ., concur.

Hornsby, C. J., and Jones and Adams, JJ., dissent.

JONES, JUSTICE (dissenting).

This case is before the Court upon a petition for writ of certiorari. I would reverse the judgment of the Court of Civil Appeals. Petitioner Robert Allen Williams filed suit against the respondent Illinois Central Gulf Railroad Company ("ICG") based on negligence under the Federal Employers Liability Act, 45 U.S.C. § 51 et seq. (FELA). The railroad denied liability and claimed that Williams was contributorily negligent. The case was submitted to a jury, and the jury returned a general verdict in favor of Williams in the amount of $1. The trial court entered judgment upon the verdict. Thereafter, Williams filed a motion for new trial based on a claim of inadequate damages. The trial court denied the motion, and on appeal to the Court of Civil Appeals affirmed the judgment.

The Court of Civil Appeals concisely set forth the operative facts:

> "Williams was employed as a head brakeman with ICG at the time of his injury. At approximately 10 P.M. on December 4, 1985, Williams was attempting to 'throw' a track switch (a heavy steel device used to allow trains to move from one track to another). After Williams had unlocked the track switch, he grabbed the handle of the switch and attempted to turn or 'throw' the switch. When he pulled on the handle, Williams's hands slipped off and he fell backwards. After he fell, Williams noticed grease covering his gloves and the switch handle.
>
> "Williams completed his work for the night and prepared an accident report. On the report the cause of the accident was listed as 'handle on switch was heavily greased.' Further, the report stated that the equipment was defective 'because of excessive grease on handle of switch.' The record also indicates that the handle was hard to turn.
>
> "The record further reveals testimony that the grease on the handle was not the type that the railroad used to lubricate switches and that the switch appeared to have been vandalized."

Williams's evidence revealed the resulting injuries, including a ruptured intervertebral lumbar disc and an aggravation of a pre-existing pilonidal cyst. Undisputed special damages were shown to be in excess of $30,000.

It is the uniform jurisprudence in this state that a jury's verdict, where supported by the evidence, is presumed to be accurate, and should not be disturbed on the grounds of inadequate damages, unless the amount is so inadequate as to clearly show that the verdict was the result of mistake or of prejudice, passion, or some other improper motive. This presumption is strengthened when the trial court refuses to grant a motion for a new

trial. In reviewing the trial court's decision to grant or to deny a motion for new trial on the grounds of inadequate damages, however, we must ascertain whether the verdict is consistent with the preponderance of the evidence. *Carter v. Reid*, 540 So. 2d 57 (Ala. 1989).

At the outset, it should be mentioned that the FELA supplants state laws with a uniform system of remedial rules, which govern railroad workers' claims against their employers. Specifically, it provides railroad employees an exclusive remedy against their employers for injuries resulting from their employers' negligence. *In re Second Employer's Liability Cases* 223 U.S. 1, 32 (1912). The courts have liberally construed the FELA so as to facilitate its objectives. *Urie v. Thompson*, 337 U.S. 163 (1949). See, also, Richter and Foer, *Federal Employers' Liability Act — A Real Compensatory Law for Railroad Workers*, 36 Cornell L.Q. 203 (1951). In order to ensure uniformity, federal law must take precedence over state law. "This is a necessary conclusion if uniformity is to be achieved, considering the fact that state and federal courts have concurrent jurisdiction to entertain FELA suits. 45 U.S.C. § 56." *Ex parte Burlington Northern R.R. Co.*, 470 So. 2d 1094, 1096 (Ala. 1985). See, also, Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d §§ 3526, 3527 (1984).

From its inception in 1908, the FELA has embraced a comparative negligence standard. The FELA provides, however, that, although contributory negligence "shall not bar a recovery," it may be used to diminish damages in "proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53 (1982).

The question whether a jury instruction on contributory negligence is proper depends on the facts of each individual case. "A defendant is entitled to such an instruction to the jury if there is any evidence to support that theory." *Meyers v. Union Pacific R.R. Co.*, 738 F. 2d 328, 331 (8th Cir. 1984). Correspondingly, in an FELA case, the burden of proving contributory negligence rests squarely on the railroad.

> "[If] no evidence is presented from which a jury could properly find a lack of due care by a plaintiff, then it is generally fundamental error for the [trial] court to

> give a contributory negligence instruction, and a plaintiff is entitled to a new trial."

Wilson v. Burlington Northern, Inc., 670 F. 2d 780, 782 (8th Cir. 1982), *cert. denied*, 457 U.S. 1120 (1982).

As stated in the Court of Civil Appeals' opinion:

> "ICG's contributory negligence defense was based on Williams's failure to discover grease on the handle of the switch before he attempted to throw it. ICG introduced evidence that Williams had a duty imposed by railroad rules to examine the switch before he attempted to throw it."

The question whether the alleged rule violation was admissible to show contributory negligence turns on the corresponding question whether the rule was general or specific in its terms. *Atchison, T. & S.F. Ry. v. Ballard*, 108 F. 2d 768 (5th Cir. 1940), *cert. denied*, 310 U.S. 646 (1940). Unfortunately, the rule in question is not included in the record. It should be pointed out, however, that, if the rule was merely a perfunctory reminder of caution, it should not have been submitted to the jury for the purpose of proving contributory negligence. Nevertheless, it is not on this point that I disagree with the judgment of affirmance by the Court of Civil Appeals. I agree that the contributory negligence issue was properly submitted to the jury and that the jury was properly instructed on the comparative negligence doctrine and its concommitant "reduction of damages" principle.

ICG contends that there was substantial evidence from which the jury could have found that Williams's negligence was the proximate cause of his injuries in a greater proportion than was ICG's alleged negligence. Even if we accept this conclusion, the validity of the jury verdict in favor of the plaintiff and an award of $1 is still a viable issue. It is on this point that I differ with the Court of Civil Appeals' holding that, under the facts of this case, the verdict for the plaintiff and an award of $1 is not an inconsistent verdict as a matter of law.

The evidence tends to show that vandalization of switch handles and other railroad equipment was not encountered by

the railroad employees on a regular basis. Williams testified that he had *never* encountered grease on a switch handle in his 20-plus years as a railroad employee. It should also be mentioned that, with the exception of the "inspection" issue, Williams's method of throwing the switch was not contested.

Aubrey Pollen, who had been a railroad conductor since 1960 and who was Williams's supervisor, testified:

> "Q Would you expect [Williams] that evening to go out and inspect that handle to see if it had grease on it?
>
> "A No, sir."

On recross-examination, Mr. Pollen was asked:

> "Q Mr. Pollen, are you saying you don't expect the men that work under you to inspect equipment or just look at it before they use it, even though that's in the safety rules, the operating rules, as you said, common sense?
>
> "A Well, certainly everybody would look at something before they attempted to do it. But as far as it depends on the situation. I mean, if — you don't go out and inspect every switch before you throw it if you got X amount of switches to throw, or so forth and so on. If you encounter the danger, then is when you do something about it."

Williams testified as follows:

> "Q At this point where was the engine, where was the locomotive engine?
>
> ". . . .
>
> "A 15 or 20 [feet back].

"Q And what about his headlight, did he have it on dim or bright?

"A Had it on bright.

"Q What part, if any, did that play in your ability to [see] what you were doing, sir?

"A When I was unlocking the switch?

"Q Yes, sir.

"A The headlight was blinding me.

"Q It was coming from your right side?

"A Yes, sir.

"Q Did you ever see any grease on this [handle]?

"A I did not."

Boyd Sims, a section foreman who had the responsibility of maintaining the track and switches in the area of the accident, testified that the switch operated normally on the morning after Williams's accident. Sims, a railroad employee with over 24 years' experience, further testified on direct examination:

"Q Did you get a report of Mr. Williams being injured out at that switch?

"A The next morning, yes, sir.

". . . .

"Q How did you get a report of that?

"A Mr. Reese called me and told me that somebody put too much grease on the switch or too much oil on the switch at Woodstock, to check it.

"Q But did you find oil on it?

"A I found grease on it, not oil but grease.

"Q Was it any kind of grease like you or someone else in the maintenance of way department would use on a switch?

"A No.

"Q Had you ever seen grease like that out on a switch?

"A Never in my career, never on a switch stand.

"Q What did you do when you got to the switch?

"A We took rags, or paper towels really, and wiped the grease off and took gasoline and washed the switch stand down where there was no more evidence of grease on the switch stand.

"Q Did you see anything around the switch that would indicate to you how that grease got there?

"A We found an emply cartridge or tube, a paper tube about that long and that big around that you buy a cartridge of grease in. We found one of those and a newspaper with grease on it."

It is axiomatic that an employer, in an FELA action, has the duty to exercise reasonable care in the workplace (*Kurn v. Stanfield*, 1211 F. 2d 469 (8th Cir. 1940)), and that this reasonable care standard translates into a duty of the railroad to provide its employees with a reasonably safe place to work.

"That rule is deeply engrained in federal jurisprudence. *Patton v. Texas & Pacific Ry. Co.*, 179 U.S. 658, 664, and cases cited; *Kreigh v. Westinghouse & Co.*, 214

> U.S. 249, 256, 257: *Kenmont Coal Co. v. Patton*, 268 F. 334, 336. As stated by this Court in the *Patton* case, it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care — reasonableness depending upon the danger attending the place or the machinery.' 179 U.S. p. 664. It is that rule which obtains under the Employers Liability Act. See *Coal & Coke Ry. Co. v. Deal* 231 F. 604; *Northwestern Pacific R. Co. v. Fiedler*, 52 F. 2d 400; *Thomson v. Boles*, 123 F. 2d 487; 2 Roberts, Federal Liabilities of Carriers (2d ed.) § 807. That duty of the carrier is a 'continuing one' (*Kreigh v. Westinghouse & Co., supra*, p. 256) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

Bailey v. Central Vermont Ry., 319 U.S. 350, 353 (1943).

This interminable duty under the FELA to provide a safe place to work, while measured by foreseeability standards, is more expansive that the general duty to use reasonable care. *Ragsdell v. Southern Pacific Transp. Co.*, 688 F. 2d 1281 (9th Cir. 1982).

Moreover, the foregoing authorities must be read in conjunction with 45 U.S.C. § 52, part of the Act itself. Section 52 provides in relevant part:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Although I agree with the railroad that the trial court did not err in submitting the contributory negligence issue to the jury, I do not agree that the "reduction of the damages" principle that

applies under the comparative negligence doctrine is consistent with the award of damages of $1. One does not need the skill of a mathematician to know that $1 is so small a percentage of $30,000 (.0033%) as to render the jury's finding of the comparative degrees of fault between these parties totally ridiculous.

Admittedly, it is a rare case when this Court should disturb a jury's verdict. However, in my opinion, this is one of those rare cases, because the verdict is clearly inconsistent with the preponderance of the evidence. Given the jury's finding of liability on the part of the employer and contributory negligence on the part of the plaintiff, all of the credible evidence points toward an award substantially greater than the $1 amount awarded. Indeed, the record reveals that, during summation to the jury, counsel for the railroad appropriately argued that the evidence of contributory negligence supported a diminution of the damages; and, accordingly, he suggested that, even if the jury found in favor of the plaintiff, its verdict for as little as $7,500 would be justified in light of the plaintiff's contributory negligence. My point is that not even counsel for the railroad dared to indulge in an argument so ridiculous as to suggest that the jury return a verdict for $1 in the event the jury should find for the plaintiff on the issue of liability.

Although I agree that the jury was justified in finding that Williams was guilty of contributory negligence, by the same token, given the liability of the defendant as found by the jury, I cannot agree that the jury's verdict was consistent with the evidence presented. In short, "[a]fter allowing all presumptions in favor of its correctness, [I am] convinced that the evidence against the [award] is so decided as to clearly convince [me] that it is wrong and unjust." *Deal v. Johnson*, 362 So. 2d 214, 219 (Ala. 1978).

Moreover, this case and the cases of *Thompson v. Cooper*, [Ms. 87-1270, September 29, 1989] ___ So. 2d ___ (Ala. 1989); *Moore v. Clark*, [Ms. 88-605, May 12, 1989] ___ So. 2d ___ (Ala. 1989); and *Clements v. Lanley Heat Processing Equipment*, [Ms. 87-909, May 12, 1989] ___ So. 2d ___ (Ala. 1989), are not distinguishable. Our "inconsistent verdict" holdings in those three recent cases — although decided in the context of the contributory negligence

rule and involving verdicts for the plaintiffs and awards were $0 — require a similar holding under the facts of this case.

I acknowledge, of course, that, under the comparative negligence doctrine, a jury verdict for the plaintiff in an amount substantially less than the proved special damages would not be an inconsistent verdict as a matter of law. But where, as here, the undisputed special damages alone total in excess of $30,000 and the jury finds against the defendant on the issue of liability and awards the plaintiff $1 in damages, it is inconceivable to the rational mind that the verdict represents a reasonable apportionment of the fault as between these parties. Thus, I would hold that under the facts of this case, the verdict was inconsistent and that the Court of Civil Appeals erred in not reversing for the trail court's failure to set aside the verdict and order a new trial.

Hornsby, C. J., and Adams, J., concur.